United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4280

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, A DIVISION OF RWDSU, AFL-CIO,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF THE RESPONDENT DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO.

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I N D E X

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BRIEF OF THE RESPONDENT DISTRICT 1199 NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO.

COUNTER-STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Union violated Sections 8(b)(1)(A) and 8(b)(2) by threatening to cause and thereafter causing the discharge of Verneal Salters under the union security clause because said employee continued to ask questions concerning the administration of the collective bargaining agreement?

COUNTER-STATEMENT OF THE FACTS

Introduction

This brief is submitted in support of the position of respondent District 1199 National Union of Hospital and

Health Care Employees, RWDSU, AFL-CIO (hereinafter "District 1199" or "Union") that enforcement of the order of the petitioner, National Labor Relations Board ("Board") dated June 24, 1976, should be denied.

The Complaint

The complaint in substance alleges that:

> "On or about May 23, 1975 . . . District 1199, by Edward R. Bragg, its Vice-President, threatened Verneal Salters, an employee of the Company, that District 1199 would cause her discharge by the said employer, if said employee continued to ask questions concerning the administration of the collective bargaining agreement in existence between District 1199 and the Company. . . ." (A.1c)

The complaint further alleges:

> "District 1199 demanded that the Company discharge the employee named above . . . because said employee had questioned Bragg as to the administration of the above noted contract between the Company and District 1199." (A.1c)

Facts As Adduced At the Hearing

Verneal Salters was an employee of Upper Manhattan Medical Group (hereinafter the "Company") until May 28, 1975, on which date she was discharged by her Employer pursuant to request by District 1199 in accordance with the

terms of the union security clause in the collective bargaining agreement (A.35). Salters was a member of District 1199 with a history of failing to pay dues. Although her dues were payable monthly, she made but two payments in 1970, two payments in 1971, two payments in 1972, no payments in 1973, one payment in 1974 and no payments in 1975. She made no payments from March 18, 1970 until May 17, 1971. She made no payments from July 13, 1971 until February 2, 1972. She made no dues payments from May 19, 1972 until April 29, 1974. She made no dues payments since the date of April 29, 1974 and was delinquent for a period of 13 months on the date of her discharge (A. 22-23).

According to Salters' dues records (A. 22-34), Salters received five final warning notices, on May 27, 1970, October 25, 1971, July 28, 1972, October 27, 1972 and July 25, 1974, informing her of her dues delinquency and the fact that she would be removed from membership in good standing (A. 56, 110, 121). Salters received her Union dues card (A. 30-34) in December 1969 (A. 87, 88). She admitted that she read and was aware of the "Important Regulations" found on the back page of the dues booklet which provides that "monthly union dues are payable in advance on the first day of each month" and that a member who fails to pay his dues by the 20th of the month is considered suspended and is charged a $1.00 arrears fee. (A. 88, 89)

Salters was aware of her dues delinquency (A. 91). Salters admitted that she was told to pay her dues in January 1970 (A. 91). She admitted that in 1974, she was warned by Carl Rath, the District 1199 Vice President then responsible for the administration of the contract at the Company, that if she did not pay her dues or make arrangements with the Finance Office for installment payments, a letter would be sent to her employer demanding her discharge (A. 92).

During the months of January through April 1975, District 1199 was engaged in contract negotiations with the Company. Salters was on the District 1199 negotiating committee which met regularly with the Company. The negotiations were being conducted by Vice President Edward Bragg on behalf of District 1199. Bragg had replaced Carl Rath as the 1199 Area Director responsible for the Company. Bragg testified that one of his mandates as Rath's replacement was to clear up the dues delinquency problem at the Company (A. 167). Bragg warned Salters of her dues delinquency throughout the contract negotiations from January to April (A. 168). He had told her to at least make arrangements with the Finance Office to pay her dues (A. 168). He explained to her that Mr. Kamenkowitz, the Director of the Drug Division of District 1199, and Bragg's supervisor, was pressuring him to collect the dues (A. 172). Bragg explained to Salters that he would be

obligated to have her removed from her job and that if it were not for the sensitivity of contract negotiations, he would have had her removed already (A. 169). Bragg testified that on one occasion, Salters' response to his warning was "'If you want me to pay my dues, take up a collection for me.'" (A. 170)

An agreement was reached on the contract in late April of 1975. On May 5, 1975, a contract ratification meeting was held at District 1199 headquarters for members employed at the Company (A. 172).

After the ratification vote was held and the contract approved, Bragg requested that all members who were delinquent in their dues payments should stay behind (A. 173). Bragg testified that he interviewed Zenia Walker, Delores Davis, Janis Johnson and Salters. Each agreed to make arrangements except for Salters (A. 173). Bragg met with Salters and discussed her dues delinquency with her. Both Salters and Bragg testified that the conversation took place and agreed as to its contents in many respects.

Bragg testified that he explained to Salters that he was under pressure from Kamenkowitz to remove Salters from her job. Bragg told Salters to call Mr. Rivera or Miss Austin at the Union's Finance Office to make arrangements to pay her dues (A. 173).

Salters testified that she told Bragg that she would pay her dues on May 30 when she received her vacation club money (A.99). Bragg testified that he had no knowledge of a vacation club and that he never agreed that Salters could wait until May 30 to pay her dues (A. 174). Bragg further testified that he was most concerned that Salters makes "arrangements" to pay off her dues with the Finance Office as the others he interviewed on that date had agreed to do. (A. 194) Bragg suggested to Salters that she would receive her first retroactive wage payment on May 16 and that she could use that money to make a payment (A. 194).

The District 1199 Drug Division conducts staff meetings every Friday. During those meetings, the Division Director reviews a dues delinquency list which he receives monthly and which lists the names of each person who received a final notice and the date such notice was sent (except for those persons who will receive the notice that same month in which case no date is listed) (A. 215, 216).

On Friday, May 23, 1975, Bragg attended a staff meeting at which Salters' delinquency was discussed. Kamenkowitz ordered that Salters be sent a termination letter based on Carl Rath's and Bragg's report (A. 180). Kamenkowitz is the only person within the Drug Division authorized to order

the discharge of members for non-payment of dues (A. 126). Such decisions are made on the basis of length of delinquency, willingness of the member to cooperate and past history of delinquency (A. 179). Bragg informed Kamenkowitz of Salters' unwillingness to cooperate and pay her dues or even make arrangements to pay and Rath confirmed the past problems (A. 179, 180).

During the staff meeting, Bragg received a phone call from Salters (A. 181). Bragg testified that he answered the call and that Salters told him of a problem regarding retroactive overtime payments. According to Bragg, he responded by stating:

> " . . . Listen, that is not the most important thing at this point. I was just in a meeting with Kamenkowitz and Kamenkowitz has instructed me to remove you from the job." (A. 181)

Bragg then received another call from the Company. He then called back Salters. During the return call Bragg warned Salters to make arrangements to pay or he would send out the discharge letter. Salters became angry and refused to make arrangements and hung up (A. 184).

On cross-examination, Salters testified as to the telephone call by stating that she called Bragg and informed him of a problem with the retroactive payment she received

(the payment was divided into three rather than two payments by clerical error). Salters agreed that a call then came in from the Company and that Bragg called her back. She testified that on calling back, Bragg's tone changed and that Bragg admonished her for "starting trouble" and for not making arrangements to pay her dues even though she had received a retroactive wage payment (A. 78).

Salters testified that Bragg then warned her to pay her dues or he would send out a discharge letter to which she replied, "You send a letter, you send a fucker" and hung up (A. 79). On May 27, 1975, a letter was sent to the Company requesting that Salters be discharged (A. 58, 185). On May 28, 1975, Salters was discharged by the Company (A. 35).

On May 29, Salters, after learning of her discharge, went to the Board regional office and was instructed by a Board agent to attempt to make payment of her dues (A. 212). On May 30 she appeared at District 1199 with her husband. According to Salters, the cashier refused to accept her dues and told her she had to speak to Ed Bragg. A note was attached to the file that dues should not be collected until Bragg was contacted (A. 83). According to the testimony of Mary Austin, Supervisor of Finance of District 1199, it is standard Union procedure to place notes on the file of a discharged member requiring the member to speak to his Area Director before dues are collected (A. 133).

Salters testified that she then went to see Kamenkowitz on the eighth floor but that Kamenkowitz refused to see her (A. 85).

Although many facts were controverted there was essential agreement that:

1) Salters was delinquent in her dues payments for over one year.
2) Bragg warned her on many occasions including the ratification meeting that if she did not make arrangements to pay her dues she would be fired.
3) On May 23, 1976, during a telephone conversation, Bragg admonished Salters for not making arrangements to pay her dues and warned her that if she did not pay her dues, a letter requesting discharge would be sent.
4) Salters did not attempt to pay dues until after she had been discharged.

The Dues Records of Other Employees at the Company

The Board introduced the dues records of Zenia Walker, Janis Johnson, Mary Leyton, Laura Gomez, Joyce Whitaker and Delores Williams (A. 36-39, 46-55).

These records indicate that of all the delinquent members who were employed at the Company on May 28, 1975, Verneal Salters had the worst history of dues delinquency. She was the only one who was delinquent in excess of a year and who had been delinquent on previous occasions for almost two years. Salters did not make a single dues payment in

1973, only one payment in 1974 and not a single payment in 1975. Salters, unlike the others, refused to make arrangements when Bragg requested her to (A. 173). All other employees (except for Delores Williams whom Kamenkowitz also directed to have fired and who voluntarily left (A. 189)) had not reached one year delinquencies, had made numerous payments in the past, and had cooperated and agreed to pay or make arrangements to pay (A. 173, 174, 184).

The Board's Order

On June 24, 1976 the Board affirmed the rulings, findings and conclusions of the Administrative Law Judge and adopted his recommended order.

The Board thereby, in substance concluded that:

> "By causing Upper Manhattan Medical Group to discharge Verneal Salters on May 23, 1975, for reasons other than her failure to tender dues and initiation fees, Respondent violated Section 8(b)(1)(A) and (2) of the Act.
>
> "By threatening Verneal Salters on May 23, 1975, that Respondent would seek her discharge for failure to pay dues, said threat being motivated by Respondent's antipathy toward Salters for raising questions about the administration of the collective-bargaining agreement, Respondent violated Section 8(b)(1)(A) of the Act."

The Board ordered that Salters be made whole for any loss of pay and that a letter be sent to the Company

advising that District 1199 had no objection to the re-employment of Salters.

ARGUMENT

ENFORCEMENT OF THE BOARD'S ORDER SHOULD BE DENIED AS THE ALLEGATIONS OF THE COMPLAINT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. A Union Has No Obligation to Accept The Dues of a Member Tendered Subsequent To A Demand for Discharge.

It is established beyond argument that a union has no duty to accept membership dues once a demand for discharge has been sent to an employer.

In General Motors Corp., 134 NLRB 1107, 1109, the Board itself stated:

> "In these circumstances, to find that Busefink's offer of payment, subsequent to the request for discharge but prior to his actual discharge, was sufficient to convert lawful action into unlawful action would mean that despite the absence of any other evidence of unlawful purpose, an inference is to be drawn that the Union refused to accept his offer and continued to seek his discharge for some undisclosed reason other than his prior delinquency. . . . We do not believe that the facts of a tender belatedly made after a lawful request for discharge is sufficient standing alone to warrant such an inference." (Emphasis added.)

The Board went on to dismiss the complaint.

In International Association of Machinists v. NLRB, 247 F.2d 414 (CA 2 1951), this court held that an employee's tender of dues after a union request for discharge does not render a discharge after rejection of tender unlawful by stating:

> " . . . If labor organizations are to be allowed effective enforcement of union security provisions, they must be free to invoke the sanction of loss of employment against those union members who are delinquent in tendering their periodic dues. This sanction might become meaningless if an employee could avoid its impact by an eleventh hour tender of back dues just prior to actual discharge. . . . Rather, we believe that the employee who is delinquent in paying his union dues is a 'free rider', whose discharge can be compelled by the union under an applicable union security provision even though that employee belatedly tenders his back dues in full before actual discharge." 247 F.2d at 420.

See also, NLRB v. Pacific Transport, 290 F.2d 14, 19 (CA 9 1961).

In this case, Salters made no attempt to tender her dues until after her actual discharge. In fact, she did not even attempt to pay her dues until after she was advised to do so by a Board agent (A. 212). Salters' attempt to pay her dues after a free ride for over a year can allow no inference that the Union's refusal to accept her dues was improperly motivated.

B. No Inference of Unlawful Motive May Be Drawn from a Union's Leniency In Applying a Union Security Clause.

In concluding that District 1199's application of the union security clause was unlawful, the Board placed great emphasis on the Union's lenient application of the security clause (A. 14-16). The Board's reasoning is that since other members at the Company were delinquent and were not discharged, it follows that by drawing the line at Salters, she must have been discharged for a reason other than non-payment of dues (A. 16). Such reasoning is fallacious and conflicts with the Board's established principles which allow unions to leniently enforce union security clauses so as to prevent wholesale loss of employment to its members.

In North American Refractories Company, 100 NLRB 1151, 1155, the Board held:

> "We are not persuaded on the record before us that the Respondent Local's purpose in requesting Neeper's immediate discharge in July 1950 was to punish him for his activity on behalf of another labor organization in 1948. The evidence, in our opinion, is to the contrary. For the record shows, as indicated above, that during this 2-year interim period Neeper had three times been in arrears in the payment of his dues and three times had been granted 15 additional days to pay up. On the occasion of his fourth extended default it appears that the Respondent Local adopted a sterner attitude

> and requested the strict application of its union-security clause to secure Neeper's immediate discharge. We cannot find that its conduct in so dealing with the chronically delinquent Neeper was unreasonable or discriminatory. . . ."

The undisputed facts in the instant case indicate that although the Union was lenient in applying the security clause, Salters' record was so extreme as to defy even the most benign gestures. A union cannot function if it cannot collect dues. Salters' delinquency far exceeded that of any other member at the Company as the dues record introduced by the Board indicates (A. 36-39, 46-55). She was delinquent for over a year when discharged. In her entire history as a union member at the Company she had made only six dues payments in six years, including not a single payment in all of 1973. Beyond this horrendous record, and of most importance, was her recalcitrant and recidivist refusals, when confronted by Bragg, to agree to make arrangements to pay her dues as did all the other delinquent members (A. 174).

By requesting the discharge of Salters while allowing the other delinquent members to remain employed, the Union was following reasonable guidelines for the application of the Union security clause in that:

a) Salters was delinquent in excess of one year,

b) Salters had a past history of excessive delinquency (the worst at the Company).

c) Salters repeatedly refused to cooperate and make arrangements with the Finance Office to pay her dues despite repeated and numerous warnings to do so.

Delores Williams was the only other member who was excessively delinquent on May 28, 1975, but the evidence is unrebutted that Bragg had informed Williams also that he was authorized by Kamenkowitz to send out a discharge letter but that Williams informed him she was going to quit.* (A. 189)

The Board, in its brief contends that other employees had equally poor dues records. The Board claims at page 18 of its brief that Laura Gomez was delinquent for over a year at the time Salters was directed to be discharged. However, the uncontested record indicates that Laura Gomez had made a full dues delinquency payment on May 7, 1975, just after her conversation with Bragg.

The Board at page 18 of its brief also makes reference to the dues records of Zenia Walker, Mary Leyton and Janis Johnson.

Zenia Walker had been delinquent in dues payments for only six months on the date of Salters' discharge. Walker had made a payment in November of 1975. She had made four other payments in 1975, three payments in 1974, three payments

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* The Board's failure to call Delores Williams as a rebuttal witness raises an inference that her testimony would have been favorable to District 1199.

in 1973 and four payments in 1972 (A.36-39). On May 5, 1975, the date of the ratification meeting, Walker agreed to make arrangements to pay her dues when requested by Eddie Bragg (A. 173, 174, 190). She had never before been delinquent in excess of six months.

Janis Johnson on May 28, 1975 had been delinquent for only six months. She made a payment on November 14, 1974 and had made five other payments in 1974. She made six payments in 1973 and five payments in 1972. She agreed to make arrangements to pay with Bragg on May 5, 1975 and she did. She had never before been delinquent in excess of six months (A. 46, 47, 173, 174, 190).

Mary Leyton on May 28, 1975 had been delinquent since December 16, 1974, a period of five months. Ms. Leyton made four other payments in 1974, four payments in 1973 and four payments in 1972. She had never been delinquent in excess of six months (A. 51, 52).

The Board found that "in view of the extreme leniency which the Union had afforded to other employees in the past . . . it is difficult for me to understand what legitimate reason the Union could have for not accepting Salters' attempt to pay in full on May 30." (A. 16) The Board is in effect holding that a union may not draw the line at the boundary of

reason. If District 1199 accepted Salters' dues, it would indicate to members that no dues need be paid until the eleventh hour. As stated by the court in International Ass. of Machinists v. NLRB, supra, at 426, the "sanction might become meaningless if an employee could avoid its impact by an eleventh hour tender of back dues just prior to actual discharge." Indeed, the Board is placing District 1199 in a position where it may no longer seek the discharge of an employee without raising an inference of wrongdoing. Such inference may not be permissibly drawn by the Board. The Board's inference that it could not "understand what legitimate reason the Union could have" (A. 16) for not accepting Salters' dues tender conflicts with the holdings of this court and should be discounted. District 1199's drawing the line at Salters' horrendous dues delinquency, recalcitrant and recidivist failure to pay dues,* and continued failure to cooperate by making arrangements to pay off her dues, as other employees had done or promised to do, was clearly reasonable action from which no inferences of wrongdoing may be permitted. Indeed, as the Board itself stated in North American Refractories, supra, at 1155:

> "Nor does the fact that the respondents had previously permitted delinquent members including Neeper, 15 additional days to pay dues by a liberal application of their union security clause mean that they were thereafter

* The Board admits at page 14 of its brief that "during contract negotiations, Bragg urged Salters to pay her dues and even threatened to seek her discharge if she did not."

> required to extend the same leniency to all delinquent members as a fixed obligation of law." 100 NLRB 1155.

The Union's lenient application of its dues policies was reasonable under the circumstances here, and no penalty should accrue to such laudable leniency. Standard Brands, Inc., 97 NLRB 737, 740; North American Refractories Co., supra.

C. No Substantial Evidence Has Been Presented Which Supports The Allegations of the Complaint or The Conclusion of the Board.

In the issues presented on appeal the Board states:

> "Whether substantial evidence supports the Board's finding that the Union violated Section 8(b)(1)(A) and 8(b)(2) by . . . causing the discharge of Verneal Salters . . . for reasons other than her failure to pay union dues." Brief for Board at 1. (Emphasis added.)

In counter-stating the issues presented, District 1199 stated:

> "Whether substantial evidence supports the Board's finding that the Union violated Section 8(b)(1)(A) and 8(b)((2) by . . . causing the discharge of Verneal Salters because said employer had questioned the administration of the collective bargaining agreement." Respondent's brief at 1. (Emphasis added.)

District 1199 counter-stated the issues presented in such manner because the Board's complaint alleged only that

on May 23, 1975, Edward Bragg threatened to cause the discharge of Salters if she "continued to ask questions concerning the administration of the collective bargaining agreement"; and that District 1199 in fact caused the discharge of Salters because she "questioned Bragg as to the administration [of the collective bargaining agreement]."(A.16) Nowhere in the complaint is it alleged that Salters was discharged for reasons "other than non-payment of dues". The Board is obligated to prove its averments and cannot now, on appeal, attempt to broaden the scope of its complaint without having timely moved to amend the complaint to conform to the proofs. Similarly, the Board failed to conclude as a matter of law, that Salters was discharged because she "questioned Bragg as to the administration of the . . . contract" as alleged in the complaint (A. 1c), but rather merely concluded that Salters was discharged "for reasons other than her failure to tender dues. . ."(A. 18). As such, the Board failed to conclude that the allegations of the complaint were true and enforcement of the Board's order must be denied.

The Alleged Unlawful Threat of May 23, 1975

Furthermore, the Board's conclusion that Salters was unlawfully threatened with discharge for "raising questions about the administration of the collective bargaining agreement"

(A. 18) is not based on substantial evidence. Verneal Salters' testimony regarding the telephone call of May 23, 1975 indicates that Ed Bragg did not threaten her with discharge if she continued to complain about the agreement. Rather, Salters' testimony clearly indicates that Bragg offered her a last opportunity to pay her dues or to make arrangements to pay.

Salters testified that Bragg said to her:

> "Listen, just pay your dues or I'll send the letter." (A. 79)
>
> "Just pay your dues, or else we're going to send a letter up there and have you fired." (A. 96)

There is no threat present in this statement that if Salters continued to complain about the administration of the contract, Bragg would seek her discharge, nor can such a threat be reasonably inferred.

All Bragg was attempting to do was impress upon Salters the consequences of her failure to arrange to pay her dues (A. 181). He was telling her that her prime concern should not be about getting paid but rather about paying her dues (A. 181). Salters testified that Bragg admonished her for receiving her "back pay" and still not making arrangements to pay (A. 97, 98). He did not tell her he was going to send the letter. He gave

her a final warning and opportunity to agree to go to the Finance Office and make arrangements to pay or he would send a letter. Salters refused by, in her own words, stating:

> "I said 'You send a letter, you send a fucker'. And I hung up." (A. 79)

Based on this telephone conversation, the Board concluded that Salters was threatened with discharge for questioning the administration of the contract (A. 17). Salterswas given every opportunity to pay her dues and refused. It is only reasonable and likely that a Union member would become angry when told to pay dues or be fired. That an argument may have ensued as a result of Bragg's warning to pay her dues does not imply that an unlawful threat was made.

The Alleged Unlawful Discharge of May 28, 1975

The Board's conclusion that Salters was discharged "for reasons other than her failure to pay dues" is similarly not based on substantial evidence and flows from improper inferences and errors of logic. The Board found that the "impulse to terminate Salters came . . . as a result of a phone call placed by her to him complaining about the administration of the contract" (A. 13) and that "there is every reason to believe that Salters would not have been terminated on May 28 had she not made the phone call to Bragg on May 23." (A. 13).

Merely because the telephone conversation in question may have been the impulse for the discharge does not support a violation of the Act. That Bragg admonished Salters for failure to pay dues after receiving her retroactive wages and that Salters refused in no uncertain terms to make an effort to pay or even make arrangements to pay after Bragg gave her a final warning on May 28, does not imply that Bragg's motives for seeking discharge were improper. Had Salters indicated to Bragg that she would make arrangements to pay, Bragg would not have sent the letter (A. 174, 190). It cannot reasonably be inferred from a conversation regarding retroactive wages which led to or was the "impulse" for a conversation regarding dues in which Bragg again warned Salters to pay, that Bragg's motive was to punish Salters for questioning the administration of the collective bargaining agreement. The fact that the final warning to pay dues and rejection of that warning might not have occurred but for the happenstance of Salters calling Bragg does not imply an improper motive. Had Salters innocently called Bragg about a matter unrelated to the contract in a friendly conversation, and Bragg, as he had always done when speaking to Salters (A. 168), asked Salters to take some action regarding her dues, and Salters refused, and Bragg considered this the end of his leniency, the straw that broke the camel's back, can one conclude that

Bragg's motives were improper. That "there is every reason to believe that Salters would not have been discharged had it not been for the phone call" does not logically imply that the reason for the discharge was the matter that initiated the call. That the "impulse" for the discharge may have been a phone call initially involving administration of the contract does not imply that the legal cause or reason for the discharge was a dispute over the administration of the collective bargaining agreement. Salters might just as well initially have called Bragg about the price of tea in China, which might just as well have led to the dues discussion and the final warning and rejection. Would this demonstrate that Bragg sought Salters' discharge because she asked him about the price of tea in China? Clearly, the Board has erred as a matter of law in relying on an improper standard for concluding that a violation of the Act occurred.

Furthermore, the Board in its brief put great weight on Bragg's testimony that he considered Salters to be "at times uncouth, very crude, very unprofessional and her co-workers don't particularly care for her . . . ." The Board concludes at page 16 of its brief:

> "In essence the testimony amounts to a virtual admission that the Union's unsuccessful request for Salters' discharge was motivated in substantial part by

Salters' complaint involving a fellow union member's mistake. Such a motive is plainly unlawful." Brief at 16.

Whether or not such a motive is unlawful was not the issue before the Board. The Board complained only that Salters was discharged because of her complaint regarding the collective bargaining agreement, not because of Bragg's dislike for her. Bragg testified candidly about his personal evaluation of Salters. Whether this played a role in his seeking her discharge was not an issue raised by the Board. Whether or not Bragg liked or disliked Salters, whether or not her personality played a role in his decision to discharge her, was not the matter complained of and no inference may be drawn therefrom that a "complaint regarding the administration of the collective bargaining agreement" was a motivating factor in the requested discharge.

Thus, it is clear that the record does not support by substantial evidence the allegations contained in the complaint or the conclusion reached by the Board.

D. Even If The Union Agreed to Allow Salters To Pay Her Dues At the End of March, The Revocation of Such Agreements Under The Circumstances of This Case Was Fair and Reasonable and Proper.

The Board's conclusion that a violation of the act occurred is based primarily on a finding of fact unsupported

by substantial evidence, that Bragg agreed to allow Salters to pay her dues on March 30, 1975. It is upon this finding that the Board bases its conclusion that Bragg's demand on May 23, 1975, that Salters make arrangements to pay her dues or a letter demanding her discharge would be sent was an unlawful threat. However, under the circumstances of this case, where a member has a horrendous dues delinquency record, where she was delinquent for over a year, where she received two retroactive payments that same month, and where she, unlike the others, continually refused to visit the Finance Department and pay or make arrangements to pay her dues, while at the same time she made payments into a vacation club, Bragg's revocation of the May 30 date would have been fair and reasonable.

In a case closely on point, NLRB v. Pacific Transport Lines, 290 F.2d 14, 19 (CA 9, 1961), the court upheld the right of a Union to revoke an extension of time to pay dues where the member was uncooperative and evasive. The court stated:

> "What then, of Shanghai Abe's verbal extension on April 18th and abrupt revocation two days later? The record discloses from Brown's testimony that on April 20th Shanghai Abe demanded payment 'before the ship leaves' and although Brown had $60.00 in his pocket, he again asked for time--to call his mother and have her wire the money. In view of Brown's past history of prior evasion, this request appears to be but another in an apparently endless series of 'stalls' to avoid his obligation owing under the union security agreement and imposed by the Taft Hartley Act.

> In any event, under the circumstances presented here, we think the extent of the Union's obligation, in light of the extension given on April 18th, was merely to not remove Brown from the ship without first making a demand on him for the dues. We do not think that the equities existing in favor of the Union on April 18th suddenly shifted entirely to Brown. When the demand for payment was made on April 20th, he acted at his peril, and his request for additional time was the perilous course to pursue.
>
> * * *
>
> "Here Brown was delinquent in his dues; when faced with the choice of 'pay or get off the ship,' he made no tender but instead asked for additional time. As we have already noted, there was no equitable justification for this request nor any right to such further extension. He was required to offer payment immediately; his request for time to call his mother was not such an offer. Thus any further attempts to tender back dues were untimely. . . ." 290 F.2d at 19.

The instant case is clearly analogous. The Board in its brief admits that throughout the contract negotiations, "Braggurged Salters to pay her back dues and even threatened to seek her discharge if she did not" (Petitioner's Brief at 14). The unrebutted and uncontradicted testimony is that Bragg, as well as his predecessor, Carl Rath, had on numerous occasions warned Salters to pay or at least make arrangements to pay her dues. (A. 74, 168-171) Salters, unlike the other delinquent members, never agreed to visit the Finance Department and make arrangements to pay (A. 168, 173, 190). Her past history of

evasion of dues payment is undisputed. Rather than make arrangements to pay she allegedly, though incredibly, made payments into her vacation club so that she could pay her dues (A. 102). She received two bonus retroactive payments in May and still didn't attempt to pay her dues (A. 181, 194). When Bragg requested on May 29 that Salters had better be first concerned about her dues payment or he would send a letter, Salters' response was, "You send a letter, you send a fucker. . . ." (A. 79)

Bragg gave Salters a final opportunity to take action and she refused. Even if Salters did claim she would pay on May 30, neither she nor Bragg had any duty to rely on that date. In light of Salters' continued avoidance of her dues obligations,* Bragg was entitled to insist that Salters commit herself to make arrangements for payment of dues prior to that time. By refusing, she acted at her own peril. NLRB v. Pacific Transport, supra, at 19.

The Board's reliance on an alleged agreement to allow Salters to pay on March 30, was therefore misplaced as the Union was entitled to revoke such an alleged agreement under the circumstances.

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* Another analogy to Pacific Transport, supra, is that Salters promised to pay when she received her tax refund and even breached that promise (A. 170, 171).

E. Reasonable Men Could Not Conclude, Based On the Record As A Whole, That Salters Was Discharged For Reasons Other Than Non-Payment of Dues.

In reviewing factual findings of the Board, the court is not obligated to credit portions of the record relied on by the Board without taking into account contradictory or inconsistent evidence, which, taken as a whole, detracts from its weight. The proper standard for review is set forth in NLRB v. Pacific Transport Lines, Inc., 290 F.2d 14, 18 (CA 9 1961) in which the court stated:

> "Our review of the record requires more than a glance at evidence which would support the Board's theory; the Supreme Court has defined our function clearly:
>
> > "'Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation [Section 10(e) of the Taft-Hartley Act] definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.'"
>
> Universal Camera Corp., v. N. L. R. B., 1951, 340 U.S. 474, 487, 71 S.Ct. 456, 464, 95 L.Ed 456; Morrison-Knudsen Co. v. N. L. R. B., 9 Cir., 1960, 276 F.2d 63."

This court has recently held the "substantial evidence" test in a Board enforcement proceeding to be "such evidence as would prevent the direction of a verdict in a jury

trial." NLRB v. Grease Co., ___ F.2d ___, No. 76-4087, 94 LRRM 3197, 3198 (CA 2 1977). Therefore, if reasonable men could not find, based on the record as a whole, that Salters was discharged for reasons other than non-payment of dues, an enforcement of the Board's order should be denied.

Salters claimed that on May 5, 1975, after the ratification meeting, that she promised to pay her dues on May 30, 1975 when she would receive her vacation club money (A. 79, 96). Bragg testified that he made no such agreement with Salters, but rather, that he informed Salters to see Ms. Austin and make arrangements to pay her dues as the other members (A. 174, 168, 194). Bragg further suggested that Salters use her retro-payments to make a dues payment (A.194).

Bragg testified that Salters said, "I will pay my dues at the end of the month" (A. 174).

Bragg responded, "Salters, that is not good enough" (A. 174). Bragg then told her to make arrangements to pay (A.194). Bragg testified that he never heard of the vacation club (A. 174).

Bragg's testimony is the only testimony reasonable men could credit. If Bragg had agreed to allow Salters to pay on May 30, why did he say to Salters, as Salters admits, on May 23 that:

"When you got your first back pay you didn't come down and make arrangements" (A. 95).

Bragg testified that on May 5 at the ratification meeting, he told Salters to make arrangements to pay when she got her first retro-payment on May 16, 1975 (A. 194).

Salters' testimony as to the May 23 phone conversation substantiates Bragg's version of the May 5 conversation and discredits Salters' own version. Why would Bragg have said to Salters that she received her back pay and still didn't make arrangements to pay if he did not request that she make such arrangements? Such a reference to retroactive payments would have been out of context and senseless otherwise. It should be noted that Salters twice repeated her testimony that Bragg told her she didn't make arrangements to pay. On direct testimony she stated that Bragg said:

"You've got a back pay for $26 and didn't make any arrangements to come down and pay it." (A. 71)

On cross-examination she repeated:

"You got one back pay and you didn't make any arrangements to come down and make any payments, and you have your second pay and you still haven't made any arrangements." (A. 97, 98)

Bragg testified that at a regular Friday staff meeting, the delinquency list was discussed and that Kamenkowitz had directed him to remove Salters.

The Board concluded contrary to the testimony of Bragg, that at the staff meeting of May 23, 1976, no discussion of dues delinquency took place and that Bragg was not "mandated" to discharge Salters (A. 12). The Board based this conclusion on finding that the delinquency list for the month of May had not been prepared as of May 23, 1975. Whether or not the May list had been prepared on May 23, 1975 is not dispositive of whether a discussion of delinquency occurred. Dues delinquency lists are prepared monthly (A. 7). Assuming that the Board was correct in finding that the May list had not been prepared on the 23rd, it was clear that the prior month's list had been prepared. It is equally as probable to infer that Bragg was mistaken as to the date of the list under discussion as it was to infer that no discussion took place. The testimony that such discussion took place and that Bragg was mandated to discharge Salters is unrebutted. The mere fact that Bragg might have been mistaken as to the date of the list certainly does not imply that no discussion of Salters' delinquency occurred.

Salters' entire testimony as to a vacation club passes beyond the limits of credibility. Salters testified that she deposited money into the vacation club so she could pay her dues (A. 101). It is incredible to believe that a person who was warned to pay her dues at the threat of losing her job on numerous occasions would deposit her money in a

vacation club for that purpose rather than have simply made payments into her dues account as requested by Bragg. Salters admitted that she made regular deposits into the vacation club amounting to $125 (A. 101, 102).

Furthermore, Salters claimed that she could not withdraw the money from this account until May 30 and that is why she could not pay her dues until the end of the month (A. 99). However, after being instructed by a Board agent to tender payment, she appeared at District 1199 at 10:00 a.m. on May 30 (A. 212, 214). When questioned as to when she picked up the club money, she realized she was caught in a conflict and testified that she received the money on the 29th (A. 214, 215).

Salters did not make a single reference to a vacation club in the statement she gave to the Board (A. 105). It seems rather incredulous that she would not have mentioned a matter which the Board has placed so much weight on to support Salters' otherwise unaccountable explanation of why she insisted on making no payments until May 30. (Of course, this would still not explain why she did not simply visit Ms. Austin to make arrangements to pay on May 30 or use her retro-pay to make an earlier payment.) It is rather peculiar that she could not receive her club money until the 30th day of the month, but

as soon as she was confronted with discharge, she was immediately able to pick it up on the 29th and appear at the Union at 10 a.m. on May 30. The only credible evidence supports Bragg's testimony that Salters never mentioned the vacation club and that Bragg had told Salters that he would not wait until May 30, that she had to make arrangements before then with the Finance Office, and he suggested that she do so as soon as she received her first retro-payment on May 16, and that the only reason Salters tendered dues on May 30 was that she was so instructed by a Board agent (A. 212).

The Board attempted to bolster Salters' testimony as to the vacation club by calling Eileen Wells who testified that she heard Salters tell Bragg on a train trip to Washington that she would pay her dues when she got her vacation club money, as she had already told him (A112). Salters admitted that the first time she discussed the vacation club with Bragg was at the ratification meeting (A113,114) which Bragg testified from his notes was on May 5, 1975 (A. 9). Bragg further testified that the trip to Washington was on Saturday, April 26, 1975, two weeks prior to the ratification meeting. This testimony was corroborated by two official District 1199 news magazines which placed the date of the trip at April 26 (A.60, 61). Whether Ms. Wells was mistaken or misled is of no consequence. The only documented evidence indicates that the train trip took place well before the ratification meeting which Salters testified with certainty was the first time she mentioned

the vacation club to Bragg (A. 114).

Salters' testimony is replete with other conflicts. When asked on cross-examination why she didn't make arrangements to pay off her dues, she denied knowledge that the Union allowed such arrangements (A. 102). However, she testified that Carl Rath had told her to make arrangements in 1974 (A. 92),* and that Bragg himself on May 23 during the critical phone conversation had discussed arrangements (A97, 98).

Salters also denied that she ever received any official Union notices of delinquency (A. 56) and that she never appealed any assessments (A. 91). Such testimony conflicts squarely with the documented evidence. Salters' dues records (A24-34) as explained by Mary Austin shows that on at least five occasions, Salters was sent final warning notices to her current address by certified mail** (A120, 121, 122). It is perhaps coneivable that one or maybe two of these letters were not sent; it is inconceivable that all five were misdelivered. Furthermore, why would the Union have made business entries as

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* Salters testified that in 1974, Carl Rath told her, "Salters, everybody who has not paid their dues or has not made arrangements to come down to the Union to pay their dues, will get a letter." (A. 92)

** The Union produced a postal receipt which indicated that Salters was sent a warning notice by certified mail (A. 57).

to the appeal on the 1970 dues ledger if Salters had not appealed? Mary Austin testified that notices are sent in the regular course of business informing members of the time and place of the appeal (A. 122). Salters' flat denial of having received the delinquency notices or of having appealed an assessment only serves to discredit her entire testimony. The record indicates that Salters was fully aware of her delinquency and of the consequences of her stubborn refusal to pay dues.

Another conflict appears in a prior inconsistent statement given by Salters to the Board. Salters testified that on May 29, 1975, after being discharged, she called Mr. Kamenkowitz and asked him about her discharge and discussed her conversation with Bragg. According to Salters' testimony, Kamenkowitz said:

> "I don't know anything about it and I don't think we want you back in the union anymore." (A. 81)

However, in an affidavit given by Salters to the Board, in referring to the same conversation, Salters directly contradicted this testimony by stating under oath:

> "Kamenkowitz pointed out that I had been frequently late in my dues payments and I said I was aware of this and was happy that the new contract contained a dues deduction clause." (A. 105)

Even the Board itself looked with suspicion upon Salters' testimony and stated in its adopted decision:

> "I must begin with the caveat that I did not find the General Counsel's evidence to be particularly reliable." (A. 9)

The evidence when viewed on the record as a whole indicates that Salters was discharged for her stubborn and repeated refusal to pay or to even make arrangements to pay dues. There is no substantial evidence that Bragg sought her discharge because of the minor and routine matter of the clerical error regarding the number of retroactive overtime payments.

CONCLUSION

Enforcement of the Board's order should be denied in its entirety.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-4280

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

against

DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, A DIVISION OF RWDSU, AFL-CIO,

Respondent.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 101 West 80th Street, New York, N.Y. 10024.

That on April 28, 1977 deponent served the annexed

BRIEF OF THE RESPONDENT

on Elliott Moore, Deputy Associate General Counsel attorney(s) for Petitioner in this action at N.L.R.B., 1717 Penn. Ave. N.W., Washington, D.C. 20570 the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this 28th day of April, 1977.

August De Fonse

The name signed must be printed beneath

AUGUST DE FONSE

George Cohen

GEORGE COHEN
Notary Public, State of New York
No. 31-0002100
Qualified in New York County
Commission Expires March 30, 1979